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8 **UNITED STATES DISTRICT COURT**

9 **EASTERN DISTRICT OF CALIFORNIA**

10 BRIAN WHITAKER,

Case No. 1:20-cv-01831-JLT-BAK (SKO)

11 Plaintiff,

12 **FINDINGS AND RECOMMENDATION**
13 **THAT PLAINTIFF'S MOTION FOR**
14 **DEFAULT JUDGMENT BE DENIED**

v.

15 (Doc. 12)

KEVIN JEWELERS, INC.,

16 **OBJECTIONS DUE: 21 DAYS**

Defendant.

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18 On April 22, 2022, Plaintiff Brian Whitaker (“Plaintiff”) filed a motion for default
19 judgment against Defendant Kevin Jewelers, Inc. (“Defendant”), pursuant to Fed. R. Civ. P. 55(b)
20 (the “Motion”). (Doc. 12). No opposition to the Motion was filed. (*See* Docket.) After having
21 reviewed the papers and supporting material, the matter was deemed suitable for decision without
22 oral argument pursuant to E.D. Cal. Local Rule 230(g), and the Court vacated the hearing set for
23 June 1, 2022. (Doc. 14.) For the reasons set forth below, the undersigned recommends that the
24 Motion be denied without prejudice.¹

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¹ The motion for default is referred to the undersigned by E.D. Cal. Local Rule 302(c)(19) for the entry of findings
and recommendations. *See* 28 U.S.C. § 636(b)(1)(B).

I. BACKGROUND²

2 On December 30, 2020, Plaintiff filed a complaint against Defendant pursuant to Title III
3 of the Americans with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101–12213, and the California
4 Unruh Act (the “Unruh Act”), California Civil Code § 51 *et seq.* (Doc. 1 (the “Complaint”)). The
5 Complaint seeks an award of statutory damages, costs of suit, attorney’s fees, and injunctive relief.
6 *Id.* Plaintiff alleges that Defendant owns the Kevin Jewelers located at 5701 Outlets at Tejon
7 Pkwy, Tejon Ranch, California (the “Business”). (Doc. 1, ¶¶ 2, 3.) Plaintiff further alleges that
8 he is a quadriplegic and requires the use of a wheelchair for mobility (Doc. 1, ¶ 1), and the
9 Business failed to provide wheelchair accessible sales counters, thus creating “difficulty and
10 comfort” for Plaintiff and denying him full and equal access. (Doc. 1, ¶¶ 10–17.)

11 According to the proof of service filed by Plaintiff, Defendant was served on January 11,
12 2021, by substituted service on Defendant’s agent M. Savoji by serving “Teresa Guzman,
13 Manager” at 5701 Outlets at Tejon Pkwy # 835 Arvin, CA 93203 (the “Tejon Address”), which
14 is the location of the Kevin Jewelers Plaintiff visited. (Doc. 4 at 1; Doc. 1, ¶ 8.) Copies of the
15 documents were also mailed to M. Savoji at the same Tejon Address. (*Id.*)

16 Defendant did not respond to the Complaint. (See Docket.) Plaintiff requested the Clerk
17 of Court to enter default against Defendant on May 31, 2021; it was entered on April 1, 2021.
18 (Docs. 6, 7.) On April 22, 2022, Plaintiff filed a motion for default judgment against Defendant,
19 which is currently pending before Court. (Doc. 12.)

II. DISCUSSION

A. Legal Standard

22 Federal Rule of Civil Procedure 55(b) permits a court-ordered default judgment following
23 the entry of default by the clerk of the court under Rule 55(a). It is within the sole discretion of
24 the court as to whether default judgment should be entered. *See Aldabe v. Aldabe*, 616 F.2d 1089,
25 1092 (9th Cir. 1980). A defendant's default by itself does not entitle a plaintiff to a court-ordered

²⁶ Upon entry of default, “the factual allegations of the complaint, except those relating to the amount of damages, will
²⁷ be taken as true.” *TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (quoting *Geddes v. United*
²⁸ *Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977)); *see also* Fed. R. Civ. P. 8(b)(6) (“An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied.”). Accordingly, the factual background is based on the allegations of the Complaint.

1 judgment. *See id.* Instead, the Ninth Circuit has determined a court should consider seven
 2 discretionary factors, often referred to as the “*Eitel* factors,” before rendering a decision on default
 3 judgment. *See Eitel v. McCool*, 782 F.2d 1470, 1471–72 (9th Cir. 1986). The *Eitel* factors
 4 include (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive
 5 claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the
 6 possibility of a dispute concerning material facts; (6) whether the default was due to excusable
 7 neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring
 8 decisions on the merits. *Id.*

9 A plaintiff is required to prove all damages sought in the complaint. *See Televideo Sys.,*
 10 *Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1992). In addition, any relief sought may not
 11 be different in kind from, or exceed in amount, what is demanded in the complaint. Fed. R. Civ.
 12 P. 54(c). If the facts necessary to determine the damages are not contained in the complaint, or are
 13 legally insufficient, they will not be established by default. *See Cripps v. Life Ins. Co. of N. Am.*,
 14 980 F.2d 1261, 1267 (9th Cir. 1992). Once the court clerk enters a default, the well-pleaded
 15 factual allegations of the complaint are taken as true, except for those allegations relating to
 16 damages. *See Televideo Sys., Inc.*, 826 F.2d at 917.

17 “In addition, before awarding a default judgment against a defendant, the court must
 18 determine the adequacy of service of process, as well as the court’s jurisdiction over the subject
 19 matter and the parties.” *Sentinel v. Komar*, No. 119CV00708DADEPG, 2021 WL 1346025, at *6
 20 (E.D. Cal. Apr. 12, 2021) (citing *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999); *Kaldawi v. Kuwait*,
 21 709 F. App’x 452, 453 (9th Cir. 2017); *S.E.C. v. Internet Sols. for Bus. Inc.*, 509 F.3d 1161, 1165
 22 (9th Cir. 2007)).

23 **B. Analysis**

24 Service of a complaint in federal court is governed by Federal Rule of Civil Procedure 4.
 25 Under Rule 4, a corporation may be served by delivering a copy of the summons and of the
 26 complaint to an officer, a managing or general agent, or any other agent authorized by
 27 appointment or by law to receive service of process and—if the agent is one authorized by statute
 28 and the statute so requires—by also mailing a copy of each to the defendant. Fed. R. Civ. P.

1 4(h)(1)(B). Alternatively, service on a corporation may be made in accordance with state law.
2 Fed. R. Civ. P. 4(e)(1), (h)(1)(A). California Code of Civil Procedure § 416.10 (“Section 416.10”)
3 provides that a corporation may be served by delivering a copy of the summons and complaint to a
4 person designated as agent for service of process or other specified persons associated with the
5 corporation, including a general manager or a person authorized by the corporation to receive
6 service of process. Cal. Code. Civ. P. § 416.10(a), (b). A “general manager” includes “any agent
7 of the corporation ‘of sufficient character and rank to make it reasonably certain that the defendant
8 will be apprised of the service made.’” *Khachatryan v. Toyota Motor Sales, U.S.A., Inc.*, 578 F.
9 Supp. 2d 1224, 1226 (C.D. Cal. 2008) (quoting *Gibble v. Car-Lene Research, Inc.*, 67 Cal. App.
10 4th 295, 313 (1998)).

11 California law also permits substitute service on the person to be served to effectuate
12 service on a corporation “by leaving a copy of the summons and complaint during usual office
13 hours in his or her office or, if no physical address is known, at his or her usual mailing address,
14 other than a United States Postal Service post office box, with the person who is apparently in
15 charge thereof, and by thereafter mailing a copy of the summons and complaint by first-class mail,
16 postage prepaid to the person to be served at the place where a copy of the summons and
17 complaint were left.” Cal. Civ. Proc. Code § 415.20(a).

18 Here, the proof of service indicates that Defendant was served by substituted service on
19 Defendant’s agent Mr. Savoji by serving “Teresa Guzman, Manager” at the Kevin Jewelers
20 located at the Tejon Address. (Doc. 4 at 1; Doc. 1, ¶ 8.) Copies of the documents were also
21 mailed to Mr. Savoji at the Tejon Address. (*Id.*) However, although California Secretary of
22 State’s website confirms that the agent for service of process for Defendant is M. Savoji, the
23 address listed for the agent for service is 550 S. Hill St, Ste 1344, Los Angeles, California, 90013
24 (the “Hill Address”), not the Tejon Address that the process server attested to completing service
25 at. *See* CALIFORNIA SECRETARY OF STATE BUSINESS SEARCH,
26 <https://bizfileonline.sos.ca.gov/search/business> (last visited June 14, 2022). Indeed, Exhibit 5
27 attached in support of the Motion, which appears to include a printout of the California Secretary
28 of State’s website, indicates that the Hill Address is the mailing address for Mr. Savoji and

1 Defendant. (See Doc. 12-7, Ex. 5.)

2 As an initial matter, the undersigned notes that the Motion does not include a discussion of
3 whether and why Plaintiff's service of Defendant was adequate. Upon review of the proof of the
4 service, the undersigned finds that Defendant has not been properly served. First, with regard to
5 Rule 4(h)(1)(B) and Section 416.10, there is no evidence that Ms. Guzman is a person designated
6 as an agent for service of process. The evidence before the Court indicates that Mr. Savozi is the
7 authorized agent to accept service on behalf of Defendant. (See Doc. 12-7, Ex. 5.) Plaintiff also
8 has not presented any evidence that Ms. Guzman is an officer or agent of Defendant's of such rank
9 that service on her would be adequate. The proof of service appears to indicate only that Ms.
10 Guzman is the manager of that particular Kevin Jewelers location at the Tejon Address, not the
11 manager of the corporation Kevin Jewelers, Inc. (See Doc. 4 at 1.) *See Gastelum v. Cent. Valley*
12 *Hosp. LLC*, No. 1:21-CV-01079-JLT-SAB, 2022 WL 2072839, at *8 (E.D. Cal. June 9, 2022)
13 (“Nothing in the record demonstrates Ms. Early is a ‘general manager’ of Central Valley
14 Hospitality, LLC within the sense contemplated by [Section 416.10]; at most, she appears to be a
15 ‘general manager’ at the Hotel, which is where Ms. Early was served. California courts have held
16 these job titles are not equivocal for purposes of effecting service on a corporate entity.”) (citing
17 *Bakersfield Hacienda Inc. v. Superior Court*, 199 Cal. App. 2d 798, 803 (1962) (holding that
18 service on the general manager of an individual motel site did not constitute adequate service of
19 process on the corporation that owned the hotel)); *Rutherford v. Church's Chicken*, No.
20 EDCV182030MWFSHKX, 2019 WL 1723138, at *3 (C.D. Cal. Jan. 10, 2019) (“[I]t is unclear
21 how Ms. Herrere, as a ‘Shift Manager,’ is so integrated with Church's Chicken that she would
22 know what to do with the Summons and Complaint or how she holds a position as to make it
23 reasonable to imply that she is authorized to receive service on behalf of Church's Chicken as a
24 corporation”).

25 Defendant was also not properly been served via substituted service. As mentioned above,
26 California law permits service on a corporate defendant via substituted service on a designated
27 agent or corporate officer “during usual office hours in his or her office[.]” Cal. Code Civ. P. §
28 415.20(a). As discussed above, Mr. Savozi, not Ms. Guzman, is Defendant's agent for service, and

1 Plaintiff has failed to demonstrate that the Kevin Jewelers location at the Tejon Address is Mr.
2 Savoiji's office. Defendant's statement of information submitted to the California Secretary of
3 State lists the Hill Address in Los Angeles as Defendant's principal and mailing address, as well
4 as Mr. Savoiji's address. (CALIFORNIA SECRETARY OF STATE BUSINESS SEARCH,
5 <https://bizfileonline.sos.ca.gov/search/business> (last visited June 14, 2022)). (See Doc. 12-7, Ex.
6 5.) Accordingly, the undersigned finds that substituted service on Defendant was not effective
7 because service was not made at the correct place of business. *See, e.g., Gastelum*, 2022 WL
8 2072839, at *8 (finding requirements for substituted service on corporate defendant were not met
9 where the plaintiff served the manager of a particular hotel location rather than the listed agent for
10 service of process at the corporate entity's principal and mailing address); *Gomez v. Blue Daisy*
11 *Inc.*, No. 2:21-CV-04917-MCS-GJS, 2022 WL 1841613, at *1 (C.D. Cal. Jan. 11, 2022) (finding
12 no effective substituted service on corporate defendant, whose business address was in Los
13 Angeles, where documents were left with a restaurant manager in Santa Monica because
14 “[n]othing in the record indicates that the agent for service of process has an office at the
15 restaurant or that the restaurant is the agent's usual mailing address”).

16 For these reasons, the Court finds that Defendant has not been adequately served and will
17 recommend that the Motion be denied without prejudice.

18 **III. CONCLUSION AND RECOMMENDATION**

19 Based on consideration of the declarations, pleadings, and exhibits to the present motion, it
20 is HEREBY RECOMMENDED that Plaintiff's motion for default judgment (Doc. 12) be
21 DENIED without prejudice to renewal upon a showing of adequate service on Defendant.

22 These findings and recommendations are submitted to the district judge assigned to this
23 action, pursuant to 28 U.S.C. § 636(b)(1)(B) and this Court's Local Rule 304. Within twenty-one
24 (21) days of service of this recommendation, any party may file written objections to these
25 findings and recommendations with the Court and serve a copy on all parties. Such a document
26 should be captioned “Objections to Magistrate Judge's Findings and Recommendations.” The
27 district judge will review the magistrate judge's findings and recommendations pursuant to 28
28 U.S.C. § 636(b)(1)(C). The parties are advised that failure to file objections within the specified

1 time may
2 waive the right to appeal the district judge's order. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th
3 Cir. 2014).

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5 IT IS SO ORDERED.
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Dated: June 15, 2022

/s/ Sheila K. Oberto

7 UNITED STATES MAGISTRATE JUDGE
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